

QUICK GUIDE TO DRAFTING A JURY CHARGE

The Main Charge

- Examine the indictment to determine the relevant Texas Penal Code provisions.
- Compare the language of the offense or offenses charged in the indictment with the language of the relevant Penal Code provisions. In general, the indictment should track the statutory language, alleging all the elements of a particular offense or offenses.
- For each count in the indictment, determine what the elements of the offense are. Even if the indictment does not allege all the elements of an offense, the jury charge must do so. If the indictment alleges *more* than the Penal Code provision requires, it may be possible to omit the unnecessary language in the jury charge.
- With few exceptions, all offenses require both forbidden **conduct** and one or more **culpable mental states**. Some offenses also require a certain **result**—for example, homicide, which requires that the defendant’s **conduct** cause a **result**, death (*see Tex. Penal Code § 19.01*). Still other offenses include a **circumstance surrounding conduct**. For example, aggravated assault of a public servant under *Tex. Penal Code § 22.02(b)(2)(B)* requires that the person assaulted be a public servant, a **circumstance surrounding conduct**, as well as requiring the forbidden **conduct** and a proscribed **result**.

For each offense you submit to the jury, then, you must ask:

1. What is the forbidden **conduct**?
 2. Does the offense require a certain **result**?
 3. Does the offense include one or more **circumstances surrounding conduct**?
- Next determine what **culpable mental states** are required to commit the offense. A **culpable mental state** may be required as to **conduct**, a **result**, a **circumstance surrounding conduct**, or all these elements. For example, in the case of aggravated assault of a public servant, when bodily injury is alleged, the defendant must intentionally, knowingly, or recklessly cause a **result**, bodily injury. The statute also requires, however, that the state prove that the defendant *knew* the victim was a public servant—a **circumstance surrounding conduct**. In most cases, the statutory provision itself will indicate which **culpable mental states** apply, but sometimes case law will dictate that a **culpable mental state** not expressly included in the statute is also required. Finally, you must be careful to confine each **culpable mental state** to the element to which it applies. For example, in the case of injury to a child, the relevant **culpable mental states** apply to the **result**, not the **conduct** (*see Tex. Penal Code § 22.04(a)*; *Haggins v. State*, 785 S.W.2d 827 (Tex. Crim. App. 1990)).
 - Many offenses may be committed in more than one statutory manner. For example, injury to a child may be committed by either an affirmative act—for example, hit-

ting the child—or by an omission—for example, failing to provide medical care (see [Tex. Penal Code § 22.04\(a\)](#)). For each offense in the indictment, you must ask whether the state has alleged alternative statutory theories of how the offense was committed. If so, you will submit these theories to the jury in the disjunctive. The jurors must be unanimous that the state has proved the offense, but they need not be unanimous about the specific statutory manner. Do *not*, however, submit a theory to the jury if it (1) is not alleged in the indictment or (2) is not supported by the evidence adduced at trial.

- Other offenses define distinct statutory acts or results, and the jury must be unanimous on the specific act or result. For example, simple assault may be committed by causing bodily injury or by threatening another with imminent bodily injury (see [Tex. Penal Code § 22.01\(a\)\(1\), \(2\)](#)). These are separate and distinct criminal acts, so the jury must be unanimous about which act the defendant committed. You should not submit these acts in the disjunctive unless you also inform the jury that it must be unanimous about one specific act.
- If the indictment contains multiple counts, determine whether the state is seeking a conviction on each count or has alleged them in the alternative—for example, capital murder under [Tex. Penal Code § 19.03](#) in the first count and murder under [Tex. Penal Code § 19.02](#) in the second count. The jury must not be allowed to convict the defendant for two offenses when one is a lesser-included offense of the other.
- Determine which unanimity instruction to give. In general, the rule is that when the state is alleging that the defendant committed *one* offense in one of two or more ways, the jury need not be unanimous—for example, sexual assault by penetration with the penis *or* a finger. In contrast, when the state is alleging that the defendant committed *one* of two or more acts, each of which could constitute a separate offense, the jury must be unanimous as to which act was committed—for example, sexual assault by penetration of the sexual organ *or* the anus of the victim (see [Tex. Penal Code § 22.011\(a\)\(1\)\(A\)](#)).

Defensive Matters and Lesser-Included Offenses

- On request, determine if any **defenses** or **affirmative defenses** apply in the case. If so, include them, taking care to explain to the jury which party has the burden of proof.
- On request, determine if any lesser-included offense instructions should be given. Ask the party who is requesting the lesser-included offense instruction to explain what evidence raises that instruction.

Use of Evidence Instructions and Special Instructions

- On request, give a limiting instruction if extraneous offenses or bad acts have been introduced. Be careful to specifically identify the particular purpose for which the

evidence was offered. *Do not* give a laundry-list instruction—for example, “intent, knowledge, scheme, plan, opportunity, or motive.”

- Determine if any special instructions, such as an instruction on accomplice witnesses or on the law of parties, should be given.
- Determine if any special issue instructions, such as a deadly weapon finding, should be included in the guilt/innocence phase instructions.

Putting the Charge Together

- Give general instructions to be included in every case and, if applicable, an instruction on the defendant’s failure to testify.
- If multiple defendants are on trial, give a complete set of instructions for each defendant.
- Attach appropriate verdict forms. There should be one verdict form for each separate count or indictment that is submitted to the jury.
- Submit the proposed charge to each party for objections or special requests and modify the charge if appropriate.